No. 77-1363

In the Supreme Court of the United States

OCTOBER TERM, 1977

HENRY C. BRADSHAW, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1363

HENRY C. BRADSHAW, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner asserts (Pet. 9-13) that the district court's failure to grant petitioner ten peremptory challenges, as provided by Fed. R. Crim. P. 24(b), constitutes reversible error.

1. After a jury trial in the United States District Court for the District of the Virgin Islands, petitioner was convicted of first degree murder, in violation of V.I. Code Ann. Title 14, 922(a)(1). He was sentenced to life imprisonment without parole,

according to the mandatory provisions of V.I. Code Ann. Title 14, 923(a) (Pet. App. A2). The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that sometime during the night of March 7, 1976, Marilyn Pickering, a St. Thomas resident, was shot to death in a St. Croix hotel room (Pet. App. A2). Petitioner had "a close personal relationship" with Pickering and owned a gun of the type and caliber that fired the fatal shots (Pet. App. A2-A3). Moreover, petitioner had travelled to and from St. Croix under assumed names immediately before and after the murder, he was seen near the victim's hotel room close to the time of the shooting, and his fingerprint was found in the room (Pet. App. A3). There was also evidence that he attempted to conceal the crime (Pet. App. A3, A5-A6).

2. Before empanelling the jury, the trial judge discussed with counsel the number of peremptory challenges he would allow. An Assistant United States Attorney asked for more peremptory challenges "than the normal amount" (Tr. 4),[1] but the court denied this request, stating that the "normal amount now is five" (*ibid.*). Defense counsel then said: "I thought we got 11, the Defendant having 10, and, then, for the alternates an extra one" (Tr. 5). The court responded that defense counsel would have been correct "under the old rules," but that

[1] The court of appeals incorrectly stated (Pet. App. A7) that it was petitioner who asked for more than the usual number of peremptory challenges.

petitioner was now entitled to only five peremptories (*ibid.*).

The following colloquy then took place (Tr. 6):

> THE COURT: * * * I would say there will be five preemptories (sic).
>
> [DEFENSE COUNSEL]: I would like to double check that. You sound like you are not absolutely sure about the rule.
>
> THE COURT: I do not know when that went into effect but I remember checking it. I do think they are in effect since August.

Thereafter, the jury was selected, with each side being allowed to exercise five peremptory challenges. Upon selection of the jury, defense counsel told the court he was satisfied with its composition (Tr. 13-14).

Petitioner contends (Pet. 9-13) that he was entitled to 10 peremptory challenges under the terms of Fed. R. Crim. P. 24(b),[2] that he objected to the district court's ruling restricting him to five challenges, and that the district court's ruling was therefore reversible error. Alternatively, he contends that even if he did not adequately object, the trial court's restriction was plain error that should have been noticed on appeal. See Fed. R. Crim. P. 52(b).

[2] Fed. R. Crim. P. 24(b) provides in pertinent part:

> If the offense charged is punishable * * * by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. * * *

a. Petitioner is correct in stating that the trial court's limitation on the number of peremptory challenges was error.[3] He may also be correct in assuming that, had he properly preserved an objection to this error at trial, he would have been entitled to reversal of his conviction. See *Swain* v. *Alabama*, 380 U.S. 202, 219, and cases cited therein. However, a defendant cannot obtain reversal on appeal if he has not made a proper objection to the allocation of peremptory challenges at trial, unless he can also show that the error in apportioning peremptory challenges resulted in a jury that was biased against him. See *United States* v. *Projansky*, 465 F.2d 123, 139-141 (C.A. 2), certiorari denied, 409 U.S. 1006; *United States* v. *Potts*, 420 F.2d 964, 964-965 (C.A. 4), certiorari denied, 398 U.S. 941; *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58, 65-69 and n. 6 (C.A. 1), certiorari denied, 393 U.S. 1036. Cf. *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 363 (in absence of objection, actual prejudice must be shown resulting from alleged defect in grand and petit jury arrays); *United States* v. *Silverman*, 449 F.2d 1341, 1344 (C.A. 2), certiorari denied, 405 U.S. 918 (in absence of objection, actual prejudice from inclusion of statutorily disqualified

[3] As the court of appeals noted (Pet. App. A7-A8), the district court and government counsel erroneously believed that the proposed amendment to Rule 24(b), transmitted to Congress by the Chief Justice, had taken effect. This amendment would have changed the number of defense peremptories in a case such as this from 10 to 5. See 425 U.S. 1157-1163.

juror must be shown). Petitioner makes no claim that the jury in his case was actually biased.[4]

b. Nor can it be said that the statements of petitioner's counsel at the time the matter arose were sufficient to preserve an objection to the court's ruling. Given the nature of the right involved and the substantial risk of invited error—readily corrected when made but irremediable once the jury is impaneled—it is important that a clear objection be registered when the trial court proposes an inadequate number of peremptory challenges. In the instant case, petitioner not only failed to preserve an objection to the allotment of peremptory challenges, but actually lulled the trial court into believing its ruling was correct. As the court of appeals observed in examining the somewhat singular circumstances of the present case (Pet. App. A9): "Once told by

[4] Contrary to petitioner's assertion (Pet. 11), receiving fewer than ten challenges does not by itself demonstrate that "substantial rights" were affected, as required by Fed. R. Crim. P. 52(b). Petitioner appeared to be satisfied at the time of trial with the jury that was selected using only five peremptory challenges, or so he informed the court (Tr. 13-14). In any event, the situation of which petitioner complains—where he was allowed only five challenges—may result whenever defendants are tried jointly, unless the court exercises its discretion to permit additional peremptory challenges (see Fed. R. Crim. P. 24(b)), and this result, far from being error affecting the substantial rights of the accused, clearly is contemplated by the Rules. That no fundamental injustice exists is further evident from the fact that the Advisory Committee proposed, and this Court endorsed, a revision that would have reduced defense peremptories to the same number as that allotted the prosecution and as petitioner here exercisd.

defense counsel that he would 'double check' the law on peremptory challenges, the court was justified in assuming that counsel would do so and bring any error of law to the court's attention." Instead, "[w]hen the jury was finally impaneled after a short recess, both counsel affirmatively stated that they were satisfied with the composition of the jury. There was never an explicit objection that the amendment had not come into effect, and at no point during the four-day trial did defendant raise [the] issue again" (Pet. App. A8-A9).[5]

In these circumstances, the court of appeals correctly concluded that petitioner had failed to object to the limitation on his peremptory challenges, and it properly affirmed petitioner's conviction. Moreover, the question whether an objection was adequately made and preserved here turns upon the peculiar facts of this case and involves no legal issue of general importance.[6]

---

[5] The apparent failure of petitioner's counsel to check the matter out any further reflects the relatively slight significance that must have been attached to the issue in the mind of the defense.

[6] Petitioner alleges (Pet. 12-13) a conflict between his case and *Blount* v. *Jugoslavenska Linijska Plovidba*, 567 F.2d 583 (C.A. 3). In that civil case, however, the court held that "the record supports plaintiff's objection [concerning the granting of peremptory challenges] in its present form, even though it suffers from imprecision" (Pet. App. B2). And in any event, the cases present at most an intra-circuit conflict that does not warrant resolution by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 265550 19